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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1873

RICHARD LEWIS HERTHEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARNOLD MORELLI
Counsel for Petitioner
503 Executive Building
35 East Seventh Street
Cincinnati, Ohio 45202
(513) 241-3676

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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The Petitioner, Richard Lewis Herthel, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 29, 1980. A copy of such order is appended hereto at page 1a.

STATEMENT OF JURISDICTION

(1) Petitioner respectfully seeks a review of the Order of the United States Court of Appeals for the Sixth Circuit entered on April 29, 1980 affirming the judgment of conviction of the United States District Court for the Eastern District of Kentucky.

(2) There was no rehearing held in the United States Court of Appeals for the Sixth Circuit, and no extension of time within which to petition for certiorari has been made.

(3) This Court's jurisdiction is conferred by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual can be held guilty as one who ". . . conducts . . . an illegal gambling business . . .," (18 U.S.C., Section 1955) when he merely acts as a bartender, and therefore is not a necessary and integral part of the gambling business.

2. Whether the trial court erred in charging the jury that a person "conducts . . . an illegal gambling business," under 18 U.S.C. Section 1955, if he commits acts which are merely ". . . helpful in the ordinary operation of the business . . . regardless of how minor . . ." his role is.

STATUTORY PROVISIONS

§ 1955. Prohibition of illegal gambling business

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

* * *

STATEMENT OF THE CASE

A. Procedural Posture.

Petitioner requests a review of the Order of the U. S. Court of Appeals for the Sixth Circuit entered on April 29, 1980, which Order affirmed the judgment and conviction of the Petitioner in the U. S. District Court of the Eastern District of Kentucky finding Petitioner guilty of a violation of 18 U.S.C., Sec. 1955. Petitioner was indicted on January 10, 1979 along with five other defendants. All the defendants excepting one went to trial before a jury from May 15, 1979 to May 24, 1979. The jury returned a verdict of guilty against all of the defendants.

On June 4, 1979, the Petitioner Herthel was sentenced to two years imprisonment, with 120 days to be served, the remainder suspended. The Petitioner was placed on a five year probation at the conclusion of the 120 days. The Court has stayed the execution pending appeal. After timely notice of appeal, the Sixth Circuit affirmed the conviction on April 29, 1980.

B. Facts Relating To The Issues Raised In This Petition For Writ.

The evidence showed that the place where this activity was being carried on was an "after hours" operation. The jury found that illegal gambling activity was occurring.

As to the Defendant Herthel, however, the evidence merely showed that his only relationship to the premises was as a part time bartender. There was no evidence that he received any consideration from the owners or operators of the premises. There was no evidence that he served any drinks to anyone at the gambling tables. When he

was not there, the patrons would mix their own drinks. Some patrons who visited this place were not interested in gambling. All they did was to have a drink. Thus, there was no evidence of any kind that the Defendant Herthel participated in any manner in the card playing that was occurring on the premises, nor that he was an essential or integral part of the gambling activity.

ARGUMENT
FOR WRIT OF CERTIORARI

A DEFENDANT CANNOT BE HELD GUILTY AS ONE WHO "CONDUCTS . . . AN ILLEGAL GAMBLING BUSINESS" IN VIOLATION OF 18 U.S.C. § 1955 UNLESS HIS ACTS ARE A NECESSARY AND INTEGRAL PART OF THAT GAMBLING BUSINESS.

18 U.S.C. § 1955 makes culpable the acts of one who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business . . ." The Petitioner Herthel was charged only as one who "conducts" such a business through his being an occasional bartender on the premises of this "after hours" place. The jury found that illegal gambling occurred there. Herthel never, however, served drinks at the gambling tables. Sometimes he was not at the premises. People would then mix their own drinks. Further, some patrons were not interested in gambling, but just in having a drink. Herthel's job as an occasional bartender was not necessary or integral to the gambling.

Herthel sought a directed verdict of not guilty. This was denied. The Court charged the jury over Petitioner's objection:

> "The term 'conduct' as it is used in connection with a gambling business means to knowingly perform any act, function or duty which is necessary to or *helpful in the ordinary operation of the business.* A person may be found to conduct a gambling business even though he is a mere servant or employee, having no part in the management or control of the business and no share in the profits. *This includes all those who participated* in the operation of the gambling business, *regardless of how minor their roles are,* and may include dealers, waitresses, doormen, maintenance people and other street-level employees and minor functionaries." (App. 106) (Emphasis added).

This is a usage of the word "conduct" with no regard for the definition of it. "Conduct" means "to lead the action or conduct," "to direct the course of," "manage," "to direct as a leader," "to accompany *and* show the way," "to transmit (heat, electricity)," or "to be a channel for," *World Book Dictionary,* 1971 Ed., p. 440. None of those usages came close to the trial court's concept of "*helpful.*" No dictionary has ever listed "helpful" as a synonym for "conduct." This distortion of "conduct" into a synonym for "helpful" is then transmuted into one for the Dictionary of Absurd Definitions, by the instruction's statement that "conduct" means "helpful . . . *regardless of how minor (the) role. . . .*"

The Federal Reserve Board that issues the bank notes used by the gamblers; the public utilities that provide the electricity for the gamblers' lights; the highway department that provides the road to the "after-hours" place — all meet the "test" of being "helpful . . . regardless of how minor (the) role. . . ." That is no "test" — it is a dragnet to grab anybody a prosecutor wants to sweep up into his indictment.

Figures in *Alice in Wonderland* may say that words mean whatever they want them to mean. But the law does not tolerate that semantical luxury, because due process requires specificity.

The standard for determining unconstitutional vagueness has been set forth by the United States Supreme Court:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (*Connally* v. *General Construction Co.*, 269 U.S. 385 at 391 (1926)).

In *Lanzetta* v. *State of New Jersey,* 306 U.S. 451, 453 (1938), the Supreme Court condemned the voice of vagueness in a criminal statute in the following language:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the statute commands or forbids."

Exotic and standardless usage of words in criminal statutes is another form of impermissible vagueness. It is requiring one "at the peril of (his) liberty . . . to speculate as to the meaning of penal statutes. . . ." How is Herthel being "informed as to what the statute commands or forbids," if the word "conduct," used in the 1970 legislation, becomes "helpful . . . regardless of how minor the role" in 1979? Dictionaries do not sanction

that perversion of the word "conduct." The statute does not define it in that novel way. The legislative history does not authorize it. It is funny when a Mrs. Maloprop misuses word; it is not funny when a man goes to jail because of judicial alteration of legislative words.

Something must be done by this Supreme Court to restore the usage of "conduct" to its original meaning. There is ample lower court authority indicating that "conduct" requires that one be "necessary" (*U. S.* v. *Mattuci,* 502 F.2d 883, 889 (6th Cir., 1974) "necessary to the ordinary operation of such business"), or an "integral participant" (*U. S.* v. *Leon,* 534 F.2d 667, 677, (6th Cir., 1976), or have a "significant or sustained impact upon the gambling enterprise" (*U. S.* v. *Campion,* 560 F.2d 751, 754 (6th Cir., 1977) or "substantially affected (the) business" (*U. S.* v. *McCoy,* 539 F.2d 1050, 1061, (5th Cir., 1976), or "a necessary or integral part of a gambling operation" (*U. S.* v. *Box,* 530 F.2d 1258, 1268 (5th Cir., 1976). At least the standards in those cases came closer to the activist involvement required for guilt by the word "conduct."

Patently inconsistent with those cases is the definition of "helpful . . . regardless of how minor (the) role . . ." contained in *U. S.* v. *Rotchford,* 575 F.2d 166, 174 (8th Cir., 1978). *Rotchford* was relied on by the trial judge in Herthel's case. *Rotchford* is an evisceration of "conduct"; it makes "conduct" meaningless. It is not only inconsistent with the above cited cases; it also creates serious "void for vagueness" problems by creating a definition for "conduct" that no one could anticipate. It is wrong, just as the instruction in this case is wrong and requires reversal.

This problem is further compounded in the Petitioner

Herthel's situation. He was not directly involved in any manner in the gambling. He merely made drinks which were consumed by gamblers. It makes no sense to exempt the bettors from legal culpability, who are after all directly involved in the gambling, and then inculpate a part time bartender such as Herthel. This presents additional due process and equal protection problems, as well. To avoid all of these Constitutional problems, this Court should require a more rigorous definition of "conduct" than that of "helpful . . . regardless of how minor (the) role. . . ."

THIS COURT SHOULD GRANT THE WRIT BECAUSE: (1) THIS DECISION IS IN CONFLICT WITH DECISIONS OF THE OTHER COURTS OF APPEALS (AND OTHER DECISIONS OF THE SIXTH CIRCUIT ITSELF) AND (2) THIS DECISION SANCTIONS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

As we have shown above, the position taken by the Sixth Circuit and the Fifth Circuit in cases such as *Mattuci, Leon, Campion,* (all Sixth Circuit cases) and *McCoy* and *Box* (all Fifth Circuit cases) that the involvement of a defendant in order to be conducting an illegal gambling enterprise must be a necessary and integral participation is in conflict with the position taken in *Rotchford* by the Eighth Circuit which finds that conduct includes "helpful . . . regardless of how minor (the) role. . . ." Further, the Sixth Circuit's position in Pe-

titioner's case herein is in conflict with some of its own prior decisions cited above. These conflicts are grounds for this Court to take the case in under Rule 19 of the Rules of this Court.

Further, the gradual erosion of the meaning of the word "conduct", which has resulted in a transformation of that word into a totally novel meaning constitutes a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This transformation creates problems as to the constitutionality of 18 U.S.C. Section 1955 which did not exist when it was originally enacted. There are now problems of void for vagueness, denial of equal protection and due process.

As a result, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

ARNOLD MORELLI

Counsel for Petitioner

503 Executive Building
35 East Seventh Street
Cincinnati, Ohio 45202
(513) 241-3676

APPENDIX

Nos. 79-5190, 79-5191, 79-5200, 79-5201, 79-5251

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERCIA,

Plaintiff-Appellee,

vs.

JAMES DOUGLAS HOLT, JR.,
WILLIAM JAMES AHLBRAND,
RICHARD LEWIS HERTHEL,
CHARLES DAVID JOHNSON,
JOHN CLYDE AHLBRAND,

Defendants-Appellants.

ORDER

Filed April 29, 1980.

BEFORE: ENGEL, BROWN and KENNEDY, Circuit Judges.

Appellants, James D. Holt, Jr., William James Ahl brand, Richard Lewis Herthel, Charles David Johnson, and John Clyde Ahlbrand appeal from their convictions for conducting an illegal gambling business in violation of 18 U.S.C. § 1955. On appeal they raise the following issues: (1) whether the evidence was sufficient to sustain a conviction; (2) whether expert testimony regarding the usual manner in which gambling card games are played was improperly admitted; (3) whether the jurisdictional

prerequisites of the statute were met, including whether the gambling business met the thirty-day substantially continuous requirement; (4) whether the activities of some defendants amounted to conducting a gambling business within the meaning of the statute; (5) whether the District Court definition of "conduct" in the jury instructions was improper; (6) whether § 1955 gives adequate warning as to what constitutes criminal conduct; (7) whether the District Judge erred in not giving a requested circumstantial evidence instruction; (8) whether the United States Attorney's closing rebuttal argument was inflammatory and improper; (9) whether the District Judge erred in not granting additional peremptory challenges; (10) whether the District Judge improperly failed to suppress evidence in the possession of the prosecutor pursuant to an inadequate search warrant; (11) whether the District Judge erred in not granting separate trials; and (12) whether the District Judge improperly failed to grant a mistrial as to one defendant when his attorney claimed an inability to cross-examine a witness fully as a result of information about the witness gained from an attorney-client relationship with that witness. Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, the Court concludes that the judgment rendered below and the decisions of the District Court on the issues raised were correct.

Accordingly, the judgment is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk